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SUGGESTIONS FOR THEIR AMENDMENT.

GEORGE GREAVES,

[Reprinted from the Transactions of the MANCHESTER STATISTICAL SOCIETY.]

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MANCHESTER STATISTICAL SOCIETY.

On the Laws referring to Child-Murder and Criminal Abortion, with Suggestions for their amendment.

By Mr. GEORGE GREAVES.

[Read December 9th, 1863.]

In a paper read some time since before this Society, I expressed the opinion that the great and probably increasing prevalence of Infanticide, and the cognate crimes, might, in part at least, be ascribed to the present condition of the criminal law of England in reference to such offences. I showed, by arguments, the soundness of which has not, I believe, been called in question, that the law of this country as written in the statute-book, as interpreted by the judges, and as administered in courts of justice, does not tend to deter from the commission of these crimes, but rather holds out the prospect of impunity to those tempted to commit them.

In uttering these sentiments, I should perhaps have subjected myself to the charge of wantonly endeavouring to bring the law and its ministers into contempt, had I not had a strong conviction that the alleged defects admitted of an easy remedy. I will now proceed to specify the changes which, as I believe, would bring the law into greater accordance with the principles of morality, of equity, and of science, and make it, what it is not now, "a terror to evil-doers."

It will be necessary, first, briefly to show what the law at present is. The practice of the Criminal Courts in England, in dealing with one

of the offences in question, is thus stated by Archbold, one of the best and latest authorities. In describing child-murder, he says:—
 “The person killed must be a reasonable creature in being, and under the king’s peace. Therefore, to kill a child in its mother’s womb is not murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. So, if a mortal wound be given to a child while in the act of being born, for instance upon the head, so soon as the head appears, and before the child has breathed, it may be murder if the child is afterwards born alive, and dies thereof. But it must be proved that the entire child has actually been born into the world in a living state, and the fact of its having breathed is not a conclusive proof thereof. There must be an independent circulation in the child, before it can be accounted alive.”*

In somewhat different terms, but to the same effect, the law is stated by Roscoe, an equally high authority:—“A child in the womb is considered *pars viscerum matris*, and cannot therefore be the subject of murder. * * * Whether, or not, a child was born alive is a proper question for the opinion of medical men. * * The being born must mean that the whole body is brought into the world, and it is not sufficient that the child respire in the progress of birth.”†

In reference to criminal abortion, the law is thus laid down by the last quoted authority:—“A child *in ventre sa mere*” being, as we have seen, viewed as *pars viscerum matris*, “cannot be the subject of murder. At common law an attempt to destroy such a child appears to have been held to be a misdemeanour.”‡ The author then gives at length the statute relating to the offence, which, as will presently be shown, entirely ignores the risk to the life of the foetus as an element in the criminality of the act. Therefore, as a child only partially born is, by the law of England, not regarded as a living being, it is no crime wilfully to inflict upon it any amount of violent injury, provided that injury be so great as to prevent the child from

* Archbold. *Pleading and Evidence in Criminal Cases*, 14th Ed., p. 529.

+ Roscoe. *Law of Evidence*, 6th Ed., p. 652. † Ibid., p. 250.

being born alive. As it is notorious that children are capable, before the entire body has come into the world, of breathing, crying, and moving the limbs vigorously, it became necessary to declare a distinction between real life and legal life. In trying a case in which a child had been found with its head nearly severed from its body by an incised wound, and in which the medical evidence clearly proved that the child had respired, but failed in proving entire live-birth, a learned judge is said to have instructed the jury, that before they returned a verdict of "guilty," they must be satisfied that the child had been completely born alive; otherwise it might "medically," *i. e.* physiologically or really, be a living being, but it was not one "legally."* It would be sufficiently deplorable did the influence of such a direction from the bench extend only to the cases of children murdered during birth. But in practice it goes much further. It confers impunity on those who murder children shortly after birth. If at any assize there be in the calendar a case of alleged child-murder, the judge, in charging the grand jury, usually tells them that, before finding a true bill, they must be satisfied that the child had a separate existence, otherwise there would be no offence of which the law could take cognizance. If the case goes to trial, the counsel for the defence, after the statement by the medical witness of the facts which prove that the child was alive when the alleged violent injuries were inflicted upon it, and that its death had been caused by those injuries, asks the witness whether he can swear that the child was born alive. As must of necessity occur in an immense proportion of instances, the medical witness replies that he cannot so swear. The counsel then appeals to the judge, who at once stops the proceedings by directing a verdict of acquittal. To use the words of Dr. Taylor, than whom no man has had more experience in such cases, "if proof of entire live-birth be in all cases rigorously demanded on trials for child-murder, it is scarcely possible, when the prisoner is ably defended, that any convictions for the crime should take place." "The numerous acquittals," he adds, "that take place on trials for this crime, in face of the strongest medical

* Taylor. *Medical Jurisprudence*, 6th Ed., p. 469.

evidence, bear out the correctness of this opinion. The child is proved to have lived and breathed, but the medical evidence fails to show that the living and breathing took place, or continued, after entire delivery."*

It may be replied, that the impunity of the criminal is not necessarily complete,—that the law provides that a woman, acquitted on a charge of child-murder, may be found guilty of the offence of "concealment of birth," which is declared to be a misdemeanour punishable at the utmost with two years' imprisonment; and this verdict, where total acquittal does not take place, is the verdict usually given. The murderer of a newly born infant, if punished at all, incurs the penalty of a few months' detention in gaol; and if the birth were not concealed, there would be no legal guilt whatever, and consequently no infliction of punishment. Should a woman, after strangling or otherwise killing her infant, openly produce its body, asserting that it had died during its birth, she would, as the law now stands, entirely escape its censure.

As ordinary minds cannot understand the subtleties of the question, and can least of all appreciate the nice distinctions between "medical life" and "legal life," the impression necessarily produced on the public mind is that the life of an infant, especially if it be illegitimate, is, in the opinion of the makers and expounders of the law, of little value, and that the refinements of evidence are mere legal fictions, designed to facilitate the escape of the accused.

The influence of these impressions is visible in the assize courts. Juries are only too ready to follow the course thus indicated, and, in spite of the strongest possible evidence of the wilful murder of a child born alive, to find the prisoner guilty of the offence of concealment only, or, as in two cases tried this year (at Liverpool and at Durham), to acquit her altogether. A combination of causes, probably, leads to this lamentable miscarriage of justice. There is first the wide-spread and increasing repugnance to capital punishment under any circumstances, but which is naturally stronger in the case of women than in that of the robust sex. Then there is

* *Op. Cit.*, p. 484.

the conviction that the law is unequal in its incidence, in visiting the erring mother alone with its inflictions, while the often more guilty male parent is suffered to go unchallenged. But, after making full allowance for these considerations, I cannot but think that, in the deplorable results in question, we behold the inevitable consequences of the unsound teaching of that authority which, to the bulk of the community, is the principal instructor in moral relations.

And then as to abortion-procuring. To those who have been taught that the foetus in the womb is merely *pars viscerum matris*, it is only a small step further to believe that it is, at least in the earlier months of pregnancy, a mere visceral obstruction, to be, like any other such obstruction, purged away, without any breach of the moral law, provided it can be done without injury to the mother. Hence the crime of procuring abortion is daily becoming more frequent, even among married women. A writer in the number for last October of one of the leading medical periodicals of the day, *The British and Foreign Medico-Chirurgical Review*, remarking on the disapprobation, expressed by me, in my former paper, of the employment of fallen women as wet-nurses, says:—"If we become too stern with necessitous and 'fallen' mothers, abortions, still-births, and infanticide will soon augment. If we show ourselves uncompromising with the fashionable parent, 'mishaps' might possibly become more frequent in circles where they are at present only occasionally known." Comment, on such prognostications, from such a source, were needless.

We can scarcely expect to attempt, with any success, the amendment of the law as it now stands, without knowing how it has come into its present condition. To learn this it will be necessary briefly to review the legislative enactments, with reference to the crimes in question, of the principal nations of ancient and modern times. In the most ancient code with which we have any acquaintance, that, viz., of Moses, there is no special provision against the murder of infants. Neither is the crime of wilfully causing abortion forbidden, for the casualty referred to in Exodus xxi., v. 22, is that of the accidental injury of a pregnant woman, in a fray between two men, causing her miscarriage. The Jewish writer Philo was justified

in his boast, that the crimes of infanticide and abortion-procuring were not specially forbidden to his countrymen, because they were unknown among them.* It was far otherwise with the heathen people who surrounded them. In the most polished states of antiquity, not only were these crimes largely practised, but they were defended on grounds of state policy. Other nations, more immediate neighbours of the Israelites, offered their children in sacrifice, and, when the chosen people fell away into idolatry, they also made their children to pass through the fire to Molech. Cured, by their long captivity, of their propensity to idolatry, they suffered natural affection to have its full sway, and there exists ample proof that, even after they had ceased to be the chosen people, the love of offspring existed among the Jews in a high degree.† When, therefore, all that, in Judaism, was of universal and abiding application, was adopted into the christian system of doctrine and morals, this virtue became prominent in the teaching of the early Christians, and the more so from its contrast with the principles and practices of heathenism.

The fathers of the Church strongly denounced the crimes both of infanticide and of foeticide. The eloquent Tertullian is most explicit in his condemnation of the latter offence. He says, that to prevent a child's being born alive is "murder by anticipation;" that "he is already a man who is about to become one;" that "to exterminate nascent life is as criminal as to destroy a being already born."‡ The testimony of Minucius Felix is, however, the most valuable. He was not only a christian apologist, but a rhetorician and a lawyer, and therefore knew well the full force and meaning of the terms which he employed, and the impression they would make on those whom he addressed. Now this writer speaks of the killing of the child unborn as not murder only but "*parricide*."§ Those who are

* Milman. *History of the Jews*, 3rd Ed., vol. I. p. 171.

† It is difficult not, in thought, to connect this virtue of the Hebrews, with the chastity, in which, as Dr. Temple tells us, in his celebrated essay on "The Education of the World," they far exceeded every other nation. See *Essays and Reviews*, p. 12.

‡ Tertullian. *Apologet.* § Minucius Felix. *Octavius*.

acquainted with the horror entertained by the Romans of the crime of murdering a parent, and the fearful penalty which it involved, can appreciate the enormous discrepancy between the sentiments of this early christian lawyer, and those of modern English lawyers and legislators, in reference to the offence of wilfully causing abortion. After the empire became christian, the killing of the child, born or unborn, was, by law, declared to be equally criminal with the murder of an adult; and successive emperors endeavoured to check the practice, both by penal enactments, and by provision for the infants whom their parents, from inability to maintain them, might have been tempted to destroy. *

These teachings of early christianity met with a hearty response from the northern conquerors of Rome, because they were in accordance with their previous customs. Hence, in the different kingdoms which arose on the ruins of the empire, most stringent laws were enacted in relation both to child-murder and to abortion-procuring. I am not aware that, as became customary in reference to other crimes, torture was employed to compel confession, but in accordance with the harsh and even iniquitous character of the criminal jurisprudence of the middle ages generally, guilt was assumed on evidence which we now should consider as most insufficient. In our own country, so late as the reign of James the First, a law was made, enacting, that if a woman should be proved to have concealed the body of her illegitimate child, she should be convicted of having murdered it, and should suffer death as a felon, unless she were able to prove, by at least one witness, that the child had been born dead. Under this statute, there can be no doubt that many a woman underwent capital punishment whose sole offence had been that of attempting to escape disgrace, by secretly disposing of the body of a still-born child. Blackstone tells us that this statute, which he says "savours pretty strongly of severity," had its counterpart in the codes of several other European nations. In Scotland the law was somewhat different, but equally harsh. By a law passed so late as 1690, it was enacted that, if a woman should have concealed her situation

* Beck. *Medical Jurisprudence*. Burke Ryan. *Infanticide*.

during the whole period of her pregnancy, that if she should not have called for help at her delivery, and if the child should be either found dead, or be altogether missing, she was to be adjudged guilty of having murdered it. Sir Walter Scott tells us, in the notes to *The Heart of Midlothian*, that in the last century many women suffered death under this severe Act.

As has already been said, the crime of procuring abortion was, by the earlier law of the principal European nations, which was founded on that of the christian Roman empire, placed in the same category with child-murder. But, although the laws of these different states, by treating this crime as murder, recognized the life of the child in the womb, there was a doubt as to the time at which its life commenced. This doubt had existed from very early times. The teachings of the Grecian and Roman philosophers were some excuse for the evil practices of their fellow-countrymen. Some of them taught that the foetus was endowed with life thirty days after impregnation; others extended the term of its inanimate condition to forty, others to eighty days. The Stoics said that it was not alive until it had breathed. Christian jurists, and even some theologians, were influenced by these notions until a very late period. It finally came to be held, that the foetus was not alive until its movements were felt by the mother, an event which was thence called quickening, and, as we shall see, this opinion guided the decisions of our legislators, and it is still the popular belief. *

In the course of the last two centuries great improvements were gradually effected in the criminal jurisprudence of this country. The barbarous punishments previously inflicted fell into disuse, and more equitable rules of evidence and presumption were established. Unhappily, in reference to the crimes in question, the alteration in public sentiment and in legal opinion, went further. It is possible to diminish the severity of the punishment for crimes, and to give accused persons every fair chance of establishing their innocence, without any diminution in public estimation of the enormity of the offences themselves. Murder would still be the highest crime in contemplation of the law, were death punishment abolished. But, as

* Beck. *Medical Jurisprudence*, 7th Ed., pp. 238 *et seq.*

I have said, the change in reference to the killing of a child not yet come into the world, went beyond the requirements of humanity and justice, and extended to a depreciation of the magnitude of the crime itself. The precise time at which the change in opinion, in relation to this crime, commenced, it is difficult to say. It was probably when, at the revival of learning, Grecian philosophy began to have greater sway than it had possessed during the middle ages. The alteration was fully established by the time of Sir Matthew Hale, for he tells us that, if anything is done to "a woman quick or great with child, to make an abortion, or whereby the child within her is killed, it is not murder or manslaughter by the law of England, because it (the child) is not yet *in rerum naturá*."* Blackstone, writing a century later, says—"If a woman is quick with child, and by potion or otherwise killeth it in her womb, or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was, by the ancient law, homicide, or manslaughter." In a note, he adds—"The distinction between murder and manslaughter, or felonious homicide, in the time of Bracton (*i. e.* in the 13th century), was in a great degree nominal." "But," he proceeds, "the modern law does not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanour."†

Although public opinion, as to the mode in which crimes, of the kind we are considering, were to be dealt with, had thus been gradually undergoing change in the direction of greater lenity, yet the effects of the change were not visible in the statute-book until the beginning of the present century. In 1803, an Act was passed which, after repealing the harsh law of James the First, ordained that a woman charged with the murder of her bastard child should be tried "by the same rules of evidence and presumption as by law are allowed to have place in other trials of murder: and that if acquitted, and it should appear on evidence that the woman had been delivered of a child, and that she had, by secret burying or otherwise, endeavoured

* Hale, 1 P. C., 433.

† Blackstone. *Commentaries*, vol. I., p. 129.

to conceal the birth thereof, she should be imprisoned for any term not exceeding two years." *

At the same time, an Act was passed in reference to the criminal procuring of abortion. It decreed that the attempt by any means to cause the miscarriage of a woman not being, or not being proved to be quick with child, was a felony, punishable with fine, imprisonment, whipping, or transportation for any term not exceeding fourteen years. Should the woman be proved to have quickened, the attempt was to be punished with death. †

Although, in the distinction thus made between the two periods of pregnancy, we see the influence of the erroneous opinions, on the phenomenon of quickening, already referred to, yet, on the whole, we must regard this statute as a decided improvement upon the previous condition of the law, as expounded by the writers just quoted, and as a return to truer and more equitable sentiments. Not only was the fact fully kept in view that, during at least the latter half of pregnancy the foetus is alive, but the attempt to cause abortion was declared to be, not as Blackstone had styled it, a misdemeanour, but a felony, punishable, before the imaginary term of quickening, with the heaviest secondary penalties, after quickening, with death. Foetal life was thus, on the whole, adequately protected; the law was calculated to inculcate sound notions as to its value and the guilt of destroying it. Unhappily, the ground thus gained was speedily lost.

It has been shown that, by the statute enacted at the same time with that just referred to, it was ordained that charges of child-murder should be tried by the same rules of evidence and presumption as other charges of murder. Influenced by reasons, the grounds and nature of which will be presently considered, the judges, in trying such cases, thought it right to lay down such "rules of evidence and presumption" as practically to declare that a child is not alive, and cannot therefore be killed, until its whole body is born into the world. To quote the words of Mr. Justice Littledale, whose

* Beck. *Medical Jurisprudence*, 7th Ed., p. 348.

† Ibid., p. 348.

ruling in the case of *Rex v. Poulton* (5 C. & P. 829, A.D. 1839), was confirmed on appeal by the other judges—"The material question for you (the jury) will be, Was the child born alive? for if it was not, the prisoner cannot be convicted of the murder. With respect to the birth, the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respire in the progress of birth." To kill a child in process of being born, whose body is half protruded from the person of the mother, which has even respired, was thus declared to be not murder, not manslaughter, not an offence at all. And yet, only four years before that in which this memorable decision was given, in an Act for consolidating and amending the statutes relative to offences against the person (9 Geo. IV., c. 31.), passed June, 1828, the former law of 1803, against abortion-procuring, was re-enacted in full force. And thus, for some years after 1839, the law of England, as declared by the judges, or by the statute-book, said this:—"To kill a child in the womb before it has come to maturity, is a felony punishable with death; to kill it when mature, and when labour has so far proceeded that the child's body is half in the world, and the child is capable of manifesting every sign of active extra-uterine life, is an act of which the law takes no cognizance beyond possibly punishing, as a misdemeanour, with a few months' imprisonment, the concealment of the body of the child so killed."

This incongruity between the law made by the judges and the statute law, in the course of the succeeding five years attracted the notice of the legislature, who appeared also to have, by that time, arrived at the knowledge that the distinction between the two periods of uterine life, before and after quickening, has no foundation in nature. But, unhappily, instead of recognising the indisputable fact that the embryo, from the commencement of gestation, is as truly a living being as it is an hour before delivery, they, by implication at least, declared that it is not alive during any part of its uterine existence. The Act of the 1st Victoria says—"Whosoever, with the intent to procure the miscarriage of any woman, shall unlawfully, &c., shall be guilty of felony, and shall be transported for his or her

natural life, or not less than fifteen years, or be imprisoned for not more than three years." For the first time, in an enactment of this kind, the time-honoured phrase, "quick with child," valuable as expressing the belief in the vitality of the fœtus, is omitted; the attempt to procure miscarriage is declared to be equally criminal whether the woman were pregnant or not. This, implied in the Act last cited, is expressly said in the last enactment on the subject, 24 and 25 Vic., cap. c. By that Act the attempt to cause miscarriage is equally a felony whether the woman be, or be not, with child. The risk to the life of the mother is apparently the only reason for any legislation on the subject. The life of the fœtus is altogether ignored, and the wilful procuring of abortion, unquestionably a form of murder, is made a merely statutory offence, the prohibition of which has no higher sanction than the will of the legislature.

By these successive changes, our law-makers brought the statute into accordance with the rulings of the judges, but, in so doing, they contravened the eternal principles of truth and justice, as well as legal principles still acknowledged, and even the terms of a law still in the statute book. Thus, we are told by Blackstone,* "an infant *in ventre sa mere* is supposed in law to be born (*i.e.* is legally alive) for many purposes. It is capable of having a legacy, or a surrender of a copy-hold estate," &c. Then there is the reason assigned for the respiting of a pregnant woman, capitally convicted, until she be delivered. Blackstone says †—"This is mercy dictated by the law of nature, *in favorem prolis*;" and in a note, it is added—"The execution of the law is respited not from regard to the mother, but from tenderness towards the innocent infant." If this does not mean that the infant is taken to be living, it is difficult to say what its meaning is. And further, in the section of the Consolidation Act passed in 1861 (24 and 25 Vict. cap. c., s. 60), relating to the Concealment of Birth, it is declared not to be necessary to prove "whether such child died before, during, or after its birth." Surely this is tantamount to saying that a child may before its birth, be alive, otherwise it would not be capable of then dying. Still, notwithstanding these incon-

* Comm., vol. I. p. 129. † Ibid., vol. IV. p. 394.

sistencies, there can be no doubt that, on the whole, the doctrine of the law of England now is, that, an unborn infant not being a living being, it is no breach of the rules of morality to deprive it of the life which it apparently possesses. And, the rules of evidence, in relation to the alleged murder of an infant recently born, being such as to render conviction all but impossible, the law thus further teaches that such an act is not in reality viewed as criminal.

There has thus, from the beginning of the christian era, been a gradual deterioration of public sentiment, and of legal opinion and practice, in reference to the crimes in question, until, in the present century, the teaching of the law of England has become all but identical with that of pagan philosophers and law-makers. Can we wonder, therefore, that principles and practices similar to those which characterized pagan society have become so rife among us?

That this lamentable condition of the law is due to the construction put by the judges on the clause in the Act of 1803, which ordained that charges of child-murder should be tried "by the same rules of evidence and presumption as by law have place in other trials of murder," cannot, I think, be doubted. It may seem presumptuous, especially in one not a lawyer, to attempt to assign the reasons for the apparently new application which then began to be given to the rules previously in force. Still it is necessary, for the purposes of this essay, that the attempt should be made.

The rule, as to what constitutes murder, laid down by Sir Edward Coke and Sir Matthew Hale, declares that a child not yet born cannot be the subject of murder, because "it is not yet *in rerum naturá*." In accordance with this rule, the judges were in the habit of requiring proof of live-birth, and of accepting, as sufficient evidence of that fact, the existence of certain phenomena. The progress of medical science proved, however, that the signs so relied upon were often fallacious; that, *e.g.*, it is possible for a child to breathe, and even to cry audibly, when the head only is born. As the act of respiration is the completion of all which is necessary to constitute an infant a being "*in rerum naturá*," the knowledge that it can be performed before entire birth ought to

have led to the abolition of the rule laid down by the venerable authorities above quoted, which apparently required proof of entire live-birth. Possibly such a result might have followed, had not another fact at the same time been made known, viz., that it is possible for a child, after having respired in the position described, to die from natural causes before its entire birth. Such a possibility being admitted, the judges appear to have thought it necessary, for the protection of women from the fearful consequences of unjust charges, to declare that no child is legally alive until entirely born ; in other words, that, in view of the dangers to which children are exposed in the act of birth, every child shall be assumed to be still-born, unless proved by medical or other evidence to have been born alive. In requiring such an assumption they erred in two ways. First, they enormously exaggerated the perils undergone by the child during birth ; and, secondly, while unjustly undervaluing the assistance which medical evidence is capable of giving to the discovery of truth, in such cases, they yet required from it that which, from the nature of things, it is, in an immense proportion of cases, impossible that it should afford. A properly instructed medical witness can usually distinguish the effects of accidents naturally attending birth, from those of injuries wilfully inflicted during, or immediately after, birth. He can also declare whether such injuries were or were not mortal ; but he is not, and probably never will be, able to say, in the instance of a child newly born, whether, at the time they were inflicted, a part of the body of the child was, or was not, still within the passages of the mother. It is not denied that difficulties sometimes attend the establishment of the *corpus delicti* in cases of this kind ; that the evidence is occasionally conflicting. But it is so in other trials of murder, and, were the difficulties ten-fold greater than they are, they would not, I submit, justify the continued retention of rules of evidence which frustrate the ends of justice, and too often make a trial of a charge of child-murder little better than a solemn farce.

The law of England, in all the points now referred to, contrasts unfavourably with that of other European nations. The Prussian

code, for example, distinctly recognizes the life of the fœtus, as well as that of the child partially born. "Abortion" is defined as "the intra-uterine death of the fœtus," and intentionally to kill a child "during its birth" is declared to be "*infanticide*."*

From what has now been said, it will probably have been surmised what remedy I would propose for the present unsatisfactory state of the law under consideration. It would be a return to the principles of the old law,—principles which I have already shown to have been held and enunciated by those who were divinely instructed, and whose moral teachings, therefore, had the sanction which all christian legislators have allowed to be the basis of positive morality, and of human law. That the opinions of the early christian legislators, on the vitality of the fœtus, were far more in accordance with scientific truth than those of modern English jurists, it would be a waste of time to cite authorities to prove. It is a truth long since established that the embryo or fœtus is, from the commencement of gestation, a distinct living being. The maxim that "there must be an independent circulation in the child before it can be accounted alive," betrays a lamentable ignorance of the merest elements of physiological science. From the moment that circulation exists in the embryo, that circulation is independent of that of the mother, being maintained by forces inherent in the body of the new being. During its uterine life it is dependent on the mother for the performance of the functions of nutrition and respiration; but at an early period of the process of parturition that dependence to a great extent ceases; and it has frequently, before entire delivery, an existence as independent of the mother as a child a month old. The maxim, that the child in the womb is *pars viscerum matris*, is worthy of the darkest period of the world's history. The men of the, so-called, dark ages would have been ashamed of it.

The first step would therefore be the recognition, in some way, by the Legislature, of this fundamental principle: all other necessary changes would then follow in natural succession. The attempt to cause abortion would then be a felony of the greatest magnitude, not

* See Appendix.

because declared to be so by Act of Parliament, but because it would be an attempted violation of the commandment—"Thou shalt not kill." To kill a child which, although still unborn, should have attained to such maturity as to manifest, to the most ordinary apprehension, the signs of independent, extra-uterine life, would *a fortiori* be an act of murder. In case of abortion it would, as now, be for the prosecution to show that means had been used designed for the production of such a result. In the case of a child born dead, at, or near, the full time of delivery, with wounds or marks of injury on its body, it would be for the prosecution to show, by medical evidence, that the child was living when those injuries were inflicted; that they had caused its death; and that they were such as could not be produced by the accidents naturally attending birth.

I would next repeat the statute against concealment of birth. That law appears to me to be a clumsy, roundabout, and illogical mode of inflicting a very inadequate punishment on a woman, of whose guilt of child-murder no doubt is entertained, although it may not be technically proved. It is an offence created entirely by statute, and meeting with no response from the moral sense of the community. At the same time, it cannot be denied that the secret interment of any dead body ought not to be permitted. There might, as in the Prussian code, be an enactment specially forbidding it, and making the penalty, in the case of a new-born child, more severe than in other cases. *

This law also, as has been already shown, opens a wide door for the evasion of justice. If a woman, after delivering herself in secret, should murder her child, and should then produce its body as that of a still-born child, she would entirely escape legal censure. And another case is perfectly supposable. A woman conceals her pregnancy until labour has actually commenced; the violence of her pains then compels her to make known her situation; but the case is one of some difficulty, effectual assistance is not at hand, and before it can be obtained, she is delivered of a child which is born dead, but which might have been born alive had she sooner made

* See Appendix.

known her condition, and made suitable preparations for her delivery. The child's death would be strictly attributable to the determination of the mother to conceal her pregnancy; yet, under the existing law, the woman would go unpunished, because, with a manifest intention to conceal the birth of her child, and most probably to destroy it if born alive, she had yet involuntarily betrayed her situation.

Far different would it be with an enactment rendering the concealment of pregnancy a felony. Such concealment is manifestly criminal, not only because it justifies a presumption of the intention to murder the child when born, but because it involves the neglect of the precautions and preparations necessary to the safety of the child during or after birth. Such a law would, therefore, recommend itself to the reason and conscience of mankind.

If, in any trial for child-murder, or abortion-procuring, the evidence should not fully bear out the charge of murder, but it should appear that the death of the fœtus or child was due to neglect on the part of the mother, she might be found guilty of manslaughter. By wilful negligence or omission to cause the death of a child which has been born alive, is already a most grave offence at common law. I can see no substantial reason why it should not be so in reference to a child still unborn, or only partially come into the world.

The proposal to substitute a charge of manslaughter for one of murder, in some of the cases in question, is not now made for the first time; and there is legal precedent for it. In a case tried at the Warwick Lent Assizes, in 1854 (*Reg. v. Tommey*), the judge (Coleridge J.) instructed the jury that if they believed that certain wounds on a child's throat, of which it died after its birth, had been inflicted, not wilfully with the intent to kill, but carelessly and negligently, in the attempt at self-delivery in secret, it would be manslaughter. The jury brought in that verdict. Such a verdict might, perhaps, also be adequate to a case in which a newly-born child is destroyed by wounds wilfully inflicted, but under the influence of partial temporary derangement, or, as it has been styled, sudden homicidal impulse. If in such a case there had not been total concealment of pregnancy, if there had been some attempt at prepara-

tion for the birth of a child, some provision for its safety, then the plea, in defence, of temporary insanity or delirium might be available to the extent even of total acquittal. But had there been no preparation or provision of any kind, no communication of her state to any human being, then the presumption would fairly be, that the homicidal act was the carrying out of a fixed determination that the child should not survive its birth.

I have reason to believe that the defects of the law, on which I have ventured to comment so freely, have for some time engaged the serious attention of members of the legal profession, with a view to their removal. In a work recently published, by Mr. J. F. Stephens, on "The Criminal Law of England," I have met with some observations which to some extent support the view I have taken. After saying that "a large proportion of the murders committed in England fall under the head of Infanticide," the author adds—"Capital convictions hardly ever take place, and the sentence of death has not been executed for a great length of time. The prisoner is almost always convicted of the misdemeanour of concealment of birth, or at most of manslaughter. In the first event she is subject to a maximum punishment of two years' imprisonment and hard labour. In the second the jury, from motives of pity, strain the law, which is a fresh evil. It might be made a specific offence for the mother of any new-born child to kill that child, with intent to conceal the birth, and the offence should involve liability to the maximum of secondary punishment. If this course is not taken, the punishment for concealment of birth ought to be increased, so that something like an adequate punishment might be inflicted for the murders which are called by that name."

It is highly satisfactory to have from a writer, of the authority of Mr. Stephens, the admission that a large proportion of the murders committed in this country are, by law, called by a name which implies no moral guilt, and are most inadequately punished. But the attempt to punish a crime, the blackest of which the common law takes cognizance, under the pretext of its implying the intention to commit a statutable misdemeanour, would

meet with no response from the common sense or conscience of the community, and acquittals on trials for child-murder would, I fear, still be as frequent as they now are. To permit the jury, without "straining the law," to adopt, when so inclined, the alternative verdict of manslaughter, would be a course far more consonant to reason; or a woman acquitted of child-murder, might be found guilty of the *felony* of concealment of pregnancy.

Having thus shown what, in my opinion, are the principles on which any alterations in the laws in question should be founded, I may perhaps be permitted to sketch the form which the proposed legislation might assume.

The basis of any reform must, as has been said, be the recognition of the fact that, from the commencement of pregnancy, the embryo, or fœtus, is a distinct living being. The declaration by Act of Parliament of a scientific truth is probably unusual; but it might be done implicitly. The statute might declare that, if any drug should be administered to any woman being, or believed to be, great or quick with child, with the intent to cause the death of the said child, or to cause its premature birth, by which its life would be endangered, or to prevent its being born alive, or if any such woman should, with like intent, take any drug, or if, with like intent, any instrument should be used, either by the woman herself, or by any other person, or if, with like intent, any other thing should be done, either by the woman herself, or by any other person or persons, he, she, or they should be declared to be guilty of an attempt to commit murder, which is already a felony, involving the highest degree of secondary punishment.

By another statute it might be ordained, that, if a woman, during the whole period of her pregnancy, should conceal her condition, and should not when in labour call for help, and her child should be born dead, or die shortly after its birth, she should be guilty of felony; or if she should, at the last moment, call for help, but no efficient help should be at hand, and the child in consequence die, she should be guilty of felony, but the punishment might be mitigated.

A third statute might declare that if a child, recently born, were

found dead, with wounds, or other marks of violent injury, upon its body, it should not be necessary, in order to substantiate a charge of murder, to prove that the child was born alive, but only that it was living when the said wounds or injuries were inflicted, and that they were the probable cause of its death, and that they were such as could not, naturally or accidentally, be caused in the act of birth; or if it should not be proved that the child's death had been wilfully caused, but had been produced by criminal negligence, it might be lawful for the jury to find the woman or her accomplices, if she had any, guilty of manslaughter; or a woman acquitted on a charge of child-murder might, if it should so appear in evidence, be found guilty of concealment of pregnancy.

Reference has already been made to the evil consequences of the unsound moral teaching of the law as witnessed in the Assize courts. Similar results are of daily occurrence in the Coroners' courts. On this subject, to which I alluded in my former paper, much light has recently been thrown by a "Return of the Verdicts of Coroners' Inquests in England and Wales on Children under two years of age, in the year 1861, and the first six months of 1862,"* recently ordered by the House of Commons to be printed, on the motion of Mr. Cox. It is impossible, in the very limited space at my disposal, to give anything like an analysis of this Return, which is full of most valuable information; I can only indicate one or two of the reflections arising from the perusal of it.

It seems to show, in the first place, extraordinary diversity in the rules of evidence by which the Coroners' courts, in different places, are guided. In no other way can we account for the small number of verdicts of "wilful murder" pronounced in some districts, as contrasted with their comparatively large number in others. The variations are from 25 per cent. to 0, or, if we leave out the particular return which gives the higher proportion, and which is on twelve inquests only, and may be an instance of accidental excess, the variations are from 10 per cent. to 0. The high per centage of 10 is reached in the city and liberty of Westminster. The proportion

* The part of the Return for the Metropolis districts is for six months only.

of $8\frac{1}{2}$ is reached in the county of Warwick, that of 8 in the Hanley district. In the Chester district it is $6\frac{1}{2}$ per cent.; in the borough of Liverpool $4\frac{1}{2}$; in the Wolverhampton district 4; in the city of Manchester $2\frac{1}{2}$; in the Bristol district 1 per cent. In the borough of Birmingham, the Stockport and Hyde division of the county of Chester, the West Derby and Salford divisions of the county of Lancaster, and the borough of Leeds, on a total of 607 inquests on children of two years of age and under, not a single verdict of wilful murder was pronounced. It will be observed that I have selected districts remote from each other, and of which the populations must be supposed to be differently circumstanced both as to education and means of subsistence. Still, those diversities will not explain the vast differences in the results. And, if we compare the returns from contiguous places, the diversity is still more striking. Thus, while in the city of Manchester, on 164 inquests, there were four verdicts of wilful murder, in the district of Salford, which surrounds Manchester, on 143 inquests, not a single such verdict was given. On 248 inquests held in the borough of Liverpool, the jury thought that twelve children had been wilfully murdered; in the same period of time 73 inquests were held in West Derby, which includes part of Liverpool, but on none of these was such an opinion expressed. The most striking contrast is shown in the instances of the borough of Birmingham and the county of Warwick, in which it stands. In the latter, of 85 children on whose bodies they sat, the juries appear to have thought that three had been wilfully murdered, but so happy would appear to be the social condition of Birmingham itself, that of the large number of 279 children, into the circumstances of whose death it was thought necessary by the police to inquire, not one would appear to have died even from neglect, the verdict in every case, with the exception of 17 who were still-born, being either "accidental death," or "visitation of God."

The verdicts, given in different parts of the country, differ also greatly in the amount of information they convey. In some instances the jury seem to have intended to convey the impression that, although there might not have been destruction of life by violent

means, there had been criminal negligence. Thus in the Liverpool Return, 14 children are declared to have died from "want of attention at birth." It would have been satisfactory to see such a verdict more frequently given elsewhere. One other circumstance has struck me in looking over the Return. Most rarely does the inquiry seem to have lasted more than a single day, or rather than a part of a day. The instances in which an adjournment took place for the purpose of procuring other evidence, and especially medical evidence, in the whole number of inquests, amounting to 5,547, were 37 only,—a trifle more than one-half per cent. In 5,510 cases the inquiry was despatched in a few hours. Could any fact be imagined more strongly confirmatory of the opinion already expressed, that in this England of ours, of the nineteenth century, the life of a little child is esteemed as of small value? Making all possible allowance for the accidental injuries to which children are unavoidably exposed during birth, and in the first two years of life, and for the natural causes of sudden death, it seems impossible to avoid the conclusion, that a large proportion of the children on whom inquests are held in this country, have come to their ends unfairly, and that, if the inquiry into the cause of death was, in their case, as real and as pains-taking as in that of adults, very different verdicts would often be given. It is, for example, exceedingly difficult to believe that the immense number of children declared to have been "suffocated in bed" can have been so suffocated by pure accident; that there has not, at least, been criminal negligence amounting to manslaughter. A verdict of "want of attention at birth" might assuredly, also, be far more frequently pronounced than it is; and in an immense proportion of the cases of newly born children, the jury might (as has been done in one or two instances in the district of Salford) append to their verdict—"Concealment of birth," or rather, as I have suggested—"Concealment of pregnancy."

I am far from being guilty of the presumption of thinking that the suggestions now made for the improvement of the law will soon be adopted in whole, or even in part, although firmly convinced that the truth of the principles, on which they are founded, will eventually

be recognised. My present purpose will have been answered if I shall have succeeded in drawing attention to the subject, and in producing the conviction that the legal maxims in relation to it, now in force, require revision. The apathy, now almost universally evinced, to the wide-spread destruction of infantile and fœtal life, is degrading to our character as a christian nation. In the very brief conversation which took place in the House of Commons on the presentation of the Return moved for by Mr. Cox, containing, as it did, revelations which ought to have aroused the strongest feelings of horror and of shame, a leading member of the Government is reported to have said, that the rules of evidence laid down by the judges ought not to be called in question, and that "the only chance of lessening the crime of infanticide must depend upon improved morality, flowing from the increase of education, and the improvement of physical comfort." I have written to little purpose in this and my former paper, if I have not succeeded in showing that the want of physical comfort has, in a large proportion of instances, no influence on the commission of the crimes under consideration, and that the moral instruction conveyed through the ordinary channels, is counteracted and neutralized by the teachings of the law. In vain will preachers and moralists denounce the crimes of child-murder and abortion-procuring, while the law continues to declare that, to kill an unborn child, is an act of which it can take no cognizance, and to lay down rules of evidence which render a conviction, for the murder of a child newly born, all but impossible.

APPENDIX.

The following are the portions of the Prussian code referred to at pages 17, 18 :—

PENAL CODE.

§ 180.—“ If a mother intentionally kills her illegitimate child, “ either *during* or immediately after birth, she shall be punished for “ the infanticide,” &c.

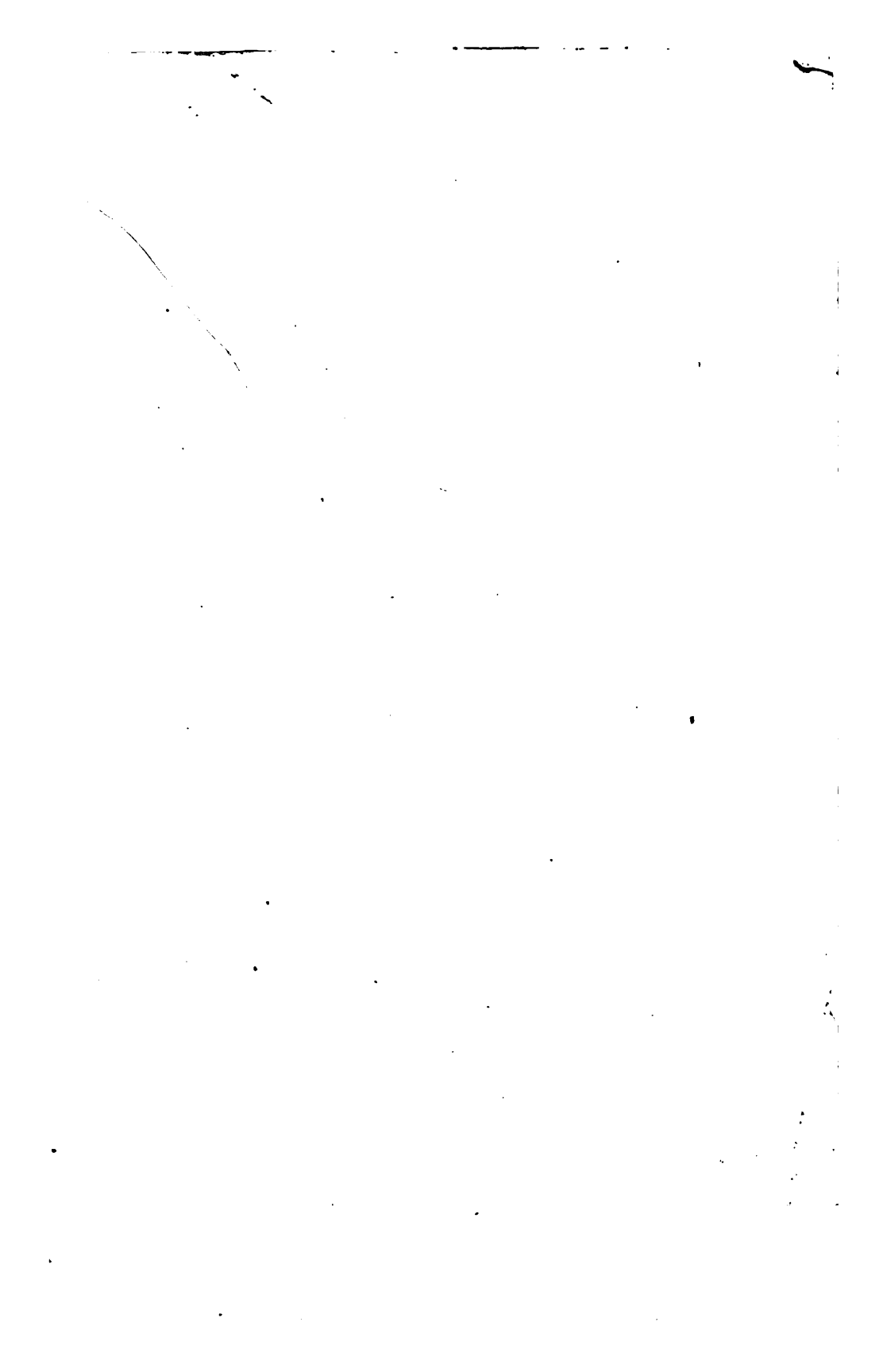
§ 181.—“ Any pregnant woman who, by external or internal “ means, produces *abortion*, or *the intra-uterine death of the* “ *fetus*,” &c.

§ 182.—“ Whoever intentionally produces *abortion*, or *the death* “ *of the fetus* in a pregnant woman,” &c.

§ 186.—“ Whoever buries, or otherwise disposes of a dead body, “ without the knowledge of the magistrates, is liable to a fine of two “ hundred thalers (£30.), or to be imprisoned for not more than six “ months. If a mother bury, or otherwise dispose of, the dead body “ of her illegitimate child, without the knowledge of the magistrates, “ she is liable to imprisonment for not more than two years.” *

In Prussia, as in most of the other German States, all bodies found under suspicious circumstances are judicially inspected, by medical officials expressly appointed for that and other purposes of police.

* *Handbook of Forensic Medicine*, by J. L. Casper. New Sydenham Society's Translation, vol. III., pp. 1 and 2.



OBSERVATIONS ON THE LAWS
REFERRING TO
CHILD-MURDER AND CRIMINAL ABORTION,
WITH
SUGGESTIONS FOR THEIR AMENDMENT.

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